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No. 85-426

In the Supreme Court of the United States

OCTOBER TERM, 1985

SAVE THE DUNES COUNCIL, INC., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
F. HENRY HABICHT II
Assistant Attorney General
ROBERT L. KLARQUIST
KATHLEEN P. DEWEY
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether an environmental group, which does not own the property involved in a condemnation suit, has a sufficiently direct and substantial interest to intervene as of right in the condemnation action pursuant to Fed. R. Civ. P. 24(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 754 F.2d 855. The opinion of the district court (Pet. App. A14-A18) is reported at 100 F.R.D. 78.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1985. A petition for rehearing was denied by corrected order on April 4, 1985. The petition for a writ of certiorari was filed on June 24, 1985, and was served on the United States on September 16, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves petitioner's attempt to intervene in a condemnation case filed by the United States against the Northern Indiana Public Service Company (NIPSCO). The land that is the subject of the condemnation action is a 36.96-acre tract, bordering the southern edge of Lake Michigan. The tract is part of an area, commonly known as Crescent Dune, that lies between the Indiana Dunes National Lakeshore on the west and one of NIPSCO's generating stations on the east (Pet. App. A2).

In 1978, the United States instituted this condemnation action in the United States District Court for the Northern District of Indiana pursuant to the Indiana Dunes National Lakeshore Act, 16 U.S.C. 460u-12. That statute had been amended in 1976 to authorize the Secretary of the Interior to acquire Crescent Dune. Section 460u-12 strictly limited the Secretary's condemnation authority by prescribing a maximum cost of $800,000 and specifying that the Secretary could not acquire the property "by any means after two years."

The value of the entire parcel had been estimated as $1,762,000 in 1976 (Pet. App. A2). When the government commenced these proceedings it set the value of the portion it sued to condemn at $277,000 (see Pet. App. A27-A28). NIPSCO filed objections to the condemnation action, contending that the government was not authorized to acquire only part of Crescent Dune, but had to acquire all of it.[1] NIPSCO also argued that the two-year time limitation set out in the statute applied to the actual acquisition of the site and not merely the time in which to file a condemnation action.

In 1982, petitioner filed a motion to intervene in the condemnation action, and, in 1983, filed complaints for mandamus against the Secretary of the Interior in the

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[1] A sea wall was excluded from the area sought in the condemnation proceeding (see Pet. App. A27-A28).

United States District Court for the District of Columbia[2] and in the Northern District of Indiana. These mandamus complaints are still pending.

On September 7, 1983, the government and NIPSCO submitted to the district court a stipulation and joint motion to dismiss the condemnation action (Pet. App. A48-A49). Following a hearing, the district court denied petitioner's motion to intervene.

A divided panel of the United States Court of Appeals for the Seventh Circuit affirmed the district court's order denying intervention as of right and denying permissive intervention (Pet. App. A1-A12). The court concluded that petitioner failed to show that it had an interest in the property sufficient to warrant intervention.

ARGUMENT

The judgment of the court of appeals is correct, does not conflict with the decisions of this Court or of any other court of appeals, and does not merit further review.

1. Fed. R. Civ. P. 24(a) specifies four requirements that must be met by a party seeking intervention as of right: (1) the application for intervention must be timely; (2) the intervenor must show an interest relating to the property or transaction that is the subject of the action; (3) the intervenor must show that the disposition of the action may as a practical matter impair or impede the intervenor's ability to protect that interest; and (4) the intervenor must show that its interest is not adequately represented by existing parties.

The district court found that, although the Council's application for intervention was timely, it failed to meet the other three requirements. The Seventh Circuit affirmed, focusing on petitioner's failure to show that it had a

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[2] On March 13, 1984, Judge Sirica transferred the case filed in the District of Columbia to the Northern District of Indiana.

sufficient interest in the property.[3] The court correctly noted that, under *Donaldson* v. *United States*, 400 U.S. 517, 531 (1971), a would-be intervenor must assert a "significantly protectable interest" in the pending action. Other courts of appeals have echoed this principle by requiring "a direct, substantial, legally protectable interest in the proceedings." *New Orleans Public Service, Inc.* v. *United Gas Pipe Line*, 732 F.2d 452, 463 (5th Cir. 1984) (citation omitted). Accord *Athens Lumber Co.* v. *Federal Elections Commission*, 690 F.2d 1364, 1366 (11th Cir. 1982); *Wade* v. *Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982); *Dilks* v. *Aloha Airlines, Inc.*, 642 F.2d 1155, 1157 (9th Cir. 1981); *Heyman* v. *Exchange National Bank*, 615 F.2d 1190, 1193 (7th Cir. 1980).

2. Petitioner contends that, despite the clear language in *Donaldson*, this Court's opinion in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967), provides a more liberal standard for intervention. In that case, the Court held that a state government and a large industrial user of natural gas could intervene as of right in a government antitrust suit under Rule 24(a)(3), as it existed prior to the 1966 amendments. It also held that a gas distributor could intervene as of right under current Rule 24(a)(2). To the extent that *Cascade* suggests a broadening of intervention rules, the Court's later and more limited reading of Rule 24 in *Donaldson* is controlling.

Moreover, despite its repeated claim of a conflict in authorities, petitioner cites no case in which a party that had no legally protectable interest in the property was permitted to intervene in a condemnation case. As the Seventh Circuit pointed out, there are only two legal interests at stake in an eminent domain proceeding. The first is that of the sovereign. The power of eminent domain is essential to the government (*United States* v. *Carmack*,

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[3] The Seventh Circuit did not address the remaining two requirements for intervention as of right.

329 U.S. 230, 236 (1946)) and authority to initiate a condemnation action resides in the legislative branch, which in turn, often delegates this authority to executive branch agencies such as the Department of the Interior. Since only the legislature or its delegates may exercise the power of eminent domain (*Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952)) no private citizen or organization may sue to condemn property unless Congress has so authorized. The role of the judicial branch in reviewing the sovereign's actions in condemnation cases is quite narrow. *Berman* v. *Parker,* 348 U.S. 26, 32 (1954). Thus, courts may determine whether a taking is for a public purpose, but the judicial role does not encompass reviewing whether the taking was necessary or whether the quantity of land taken was appropriate. *Story* v. *Marsh,* 732 F.2d 1375, 1384 (8th Cir. 1984); *Lower Brule Sioux Tribe* v. *United States,* 712 F.2d 349, 353 (8th Cir. 1983). The second interest at stake in a condemnation action is that of the landowner. The landowner's interests include whether the taking is for a public purpose under a proper delegation of authority from Congress and whether the amount of compensation is just.[4]

In contrast, petitioner has no "significant, protectable interest" in this condemnation action. See *In re Penn Central Commercial Paper Litigation,* 62 F.R.D. 341, 346 (S.D.N.Y. 1974), aff'd without opinion, 515 F.2d 505 (2d Cir. 1975) (Table) (in order to intervene, a party must

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[4] In some condemnation cases, although not in this case, the government uses the more streamlined procedure of filing a declaration of taking, which immediately vests title in the United States. No proposed land use plans or other governmental actions are at issue in any condemnation proceeding. Yet if groups like petitioner were permitted to intervene in cases where a declaration of taking had been filed or, indeed, in any condemnation case, the intended benefits of such procedures would be seriously undermined and litigation would be expanded beyond its proper focus—the assessment of just compensation due the landowner.

assert an interest based on a right that belongs to him, not a right that belongs to the existing parties). Accord *New Orleans Public Service, Inc.* v. *United Gas Pipe Line,* 732 F.2d at 464-465. Indeed, even in contexts other than condemnation proceedings, courts have denied intervention to parties whose interests were similar to petitioner's. See *Westlands Water District* v. *United States,* 700 F.2d 561 (9th Cir. 1983); *Allard* v. *Frizzell,* 536 F.2d 1332 (10th Cir. 1976); *Wade* v. *Goldschmidt,* 673 F.2d 182 (7th Cir. 1982). Accordingly, the decision denying intervention was unexceptional and does not merit further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ROBERT L. KLARQUIST
KATHLEEN P. DEWEY
Attorneys

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